IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 923 of 1999

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KULSUMBEN DAUDBHAI KHAIYANI

Versus

BAHADURBHAI JUSABBHAI KOTHARIA

Appearance:

MR SR DIVETIA for Petitioners

MR ANAND L SHARMA for Respondent No. 1

MR KP RAVAL, APP for Respondent No. 2

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 09/05/2000

ORAL JUDGEMENT

1. This is a petition under Article 227 of the Constitution of India at the instance of the original applicants who are the wife and minor son of the original respondent-husband.

2. The present petition arises from an order passed by the learned JMFC on an application by the wife and minor son under section 127 of Criminal Procedure Code for modification of the earlier order of maintenance passed under section 125 of Cr.P.C. The learned Magistrate, after appreciating the evidence on record, determined the maintenance payable to the wife and to the minor son by the husband at Rs.500/- each i.e. Rs.1000/per month in the aggregate. This order was delivered by the learned Magistrate in Criminal Misc. Application No.358/95.

3. Being aggrieved by the said order the husband filed revision before the Sessions Court, who reduced the amount of maintenance payable to the wife from Rs.500/- to Rs.400/- per month and reduced the maintenance payable to the minor son from Rs.500/- to Rs.300/- per month. It is this judgement and order of the Sessions Court which is the subject matter of the present petition before me today.

4. Before proceeding further on the merits of the matter it is desirable to keep in mind the observations of the Supreme Court in the case of Mohmmad Yunus Vs. Mohammad Mustaqim (AIR 1984 SC 38) and Khali Ahmed Bashir Vs. Tufelhussein S. Sarangpurwala (AIR 1988 SC 184), on the question of the scope and ambit of the jurisdiction of this Court in the context of the powers which this Court may exercise under Article 227 of the Constitution. The Supreme Court has observed in the aforesaid two cases that the High Court, while examining a petition under Article 227 of the Constitution of India, cannot reappreciate the evidence and cannot disturb the findings of fact recorded by the courts below except where the same are perverse, and even errors of law cannot be corrected.

5. The present petition has a considerable history of litigation between the husband and wife, particularly on the question of maintenance which requires to be noted.

6. The original application filed by the wife under section 125 Cr.PC was sometime in the year 1989, in which proceeding, by consent, the court directed maintenance to be paid by the husband at Rs.150/- per month for the wife and at Rs.75/- per month for the minor son. Thereafter in the year 1990 the wife filed Misc. Criminal Application No.314/90 under section 127 of Cr.PC. for modification of the earlier order. This application for modification was rejected by the learned Magistrate by

order dated 20th May 1991. Thereafter once again the wife applied for modification under section 127 of Cr.PC by Misc. Criminal Application No.586/91, wherein the trial court determined the compensation payable at the rate of Rs.200/- per month for the wife and at Rs.150/- per month for the minor son.

6.1 Thereafter once again the wife preferred another application under section 127 Cr.PC. for modification of the earlier order. In this last application being Misc. Criminal Application No.358/95 the learned Magistrate increased the maintenance payable to the wife from Rs.200/- to Rs.500/- per month and increased the maintenance for the minor son from Rs.150/- to Rs.500/-. As mentioned hereinabove, it was this order which was challenged by the husband by way of revision before the Sessions Court, wherein the Sessions Court interfered with the quantum of maintenance determined by the trial court and reduced the maintenance to Rs.500/- per month for the wife and Rs.300/- per month for the minor son. It is this judgement and order of the Sessions Court in revision which is the subject matter of the present petition under Article 227 of the Constitution of India.

7. As discussed hereinabove, the scope of the present petition is extremely limited and except where there are glaring errors apparent on the face of the record which would result in gross injustice if left unattended, there is no scope for interference on the facts and/or the findings of fact recorded by the Sessions Court.

8. Having carefully perused the impugned judgement and order of the Sessions Court with the assistance of the learned counsel for the petitioner, I find that the Sessions Court has rightly observed that the scope of section 125 Cr.PC is separate and distinct from the scope of application under section 127 Cr.PC. In the latter application where the party approaches for a modification and particularly for an increase in the amount of maintenance originally determined by that court under section 125 Cr.PC, the burden of proof of establishing "change of circumstances" is upon the party who approaches the court under section 127 Cr.PC. On the particular facts of the case the Sessions Court has observed that in the instant case, the wife being the applicant in the application under section 127 Cr.PC. has neither pleaded nor proved any "change of circumstances" as compared to the facts and circumstances which prevailed at the last determination of such maintenance by the competent court. The only challenge

of circumstance, which is only orally urged, is the increase in the cost of living. No doubt, technically even this has to be proved and established, though in case of applications under section 125 and 127 of Cr.PC the courts may not require strict and technical evidence of the quantum of increase in the cost of living. It may be possible to draw reasonable estimate by the courts or even by this court as to how much the cost of living would rise or be expected to rise over a period of time. The Sessions Court has rightly observed that the entire pleadings of the wife in the last application under section 127 Cr.PC are no different than the earlier pleadings made in the original application (Misc. Criminal Application No.586/91) wherein the amount of maintenance was determined at Rs.200/- per month for the wife and Rs.150/- per month for the minor child. Under the circumstances the Sessions Court was justified in concluding that between the year 1991 and the year 1995 (when the last application under section 127 Cr.PC was filed), the cost of living had not increased to the extent where the total amount of maintenance in the aggregate would justify an increase from Rs.350/- to Rs.1000/- per month. I am also in agreement with this conclusion.

9. Suffice it to say that although the Sessions Court has reduced the amount of maintenance from the amount determined by the Magistrate, the Sessions Court has nevertheless awarded to the wife and child an aggregate amount of Rs.500/- per month which is still twice the amount determined by the trial court in the earlier application decided in the year 1991. Even this determination on the face of it must be held to be generous, and does not justify any interference by this court in a petition under Article 227 of the Constitution of India.

10. This petition is, therefore, dismissed and rule is discharged. Interim relief stands vacated.

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